

Protest of) January 26, 1989
JENKINS, GALES & MARTINEZ, INC.)
Under Solicitation for Design Services) P.S. Protest No. 88-65

DECISION

Jenkins, Gales & Martinez, Inc., (Jenkins) protests its omission from the group of firms selected for an interview under a solicitation for architect/engineer design services for the remodeling of the Lakewood, CA, Post Office (Hawaiian Gardens Branch). Jenkins alleges that the selection committee was not objective and did not consider properly Jenkins' experience in its evaluation.

On August 4, 1988, the Los Angeles Facilities Service Office advertised in the Commerce Business Daily for architect/engineer services for the remodeling of the Lakewood, CA, Post Office (Hawaiian Gardens Branch). Qualification statements of interested firms were due August 25. A selection committee evaluated the 47 submissions from firms providing qualification statements, and selected six firms to be further interviewed for potential award of the project. By letter dated September 1, Jenkins was notified that it was not one of the firms selected for an interview.

The contracting officer received Jenkins' protest September 22. In that protest, as well as in supplemental comments, Jenkins asserts that "collaboration" between Postal Service staff affected the pre-selection committee's objectivity when unsolicited misrepresentations of Jenkins' experience were made, and when the committee failed to consider Jenkins' qualifications fully before making its determination. Jenkins also argues that its involvement in earlier phases of this project requires that it be included among those firms chosen for further interviews. Jenkins alleges that the decision of the committee was "discriminatory" in nature^{1/} because Jenkins' qualifications were not fairly considered. The contracting officer, in his report and in supplemental comments to this office, states that the pre-screening process was conducted in conformance with the requirements of the Procurement Manual (PM). He further states that Jenkins' performance in earlier phases of the project was seriously deficient and caused delay in the project, and that this poor record of performance contributed to its exclusion under the prescreening process. The contracting officer states that a representative from the Long Beach Division who had responsibility for the earlier phases of the project was consulted by the evaluation committee and that this representative stated that the Division was not satisfied with the protester's performance and, further, that Jenkins' workload from the Division under a two-year architect/engineer term contract

was too heavy to allow for the award of additional work. The contracting officer maintains that this information was sufficient for the committee to have recommended against the firm being considered further, a recommendation which the contracting officer adopted.

Notes in the evaluation committee members' Pre-Screening Forms, P.S. Form 5000,^{1/} indicate that the committee did not select Jenkins for an interview for two reasons: (1) the protester's previous performance deficiencies on the project; and (2) the protester's current workload which was too heavy to allow for additional postal work. A letter from the Division representative, with detailed attachments which specified the problems encountered with Jenkins' performance, including design errors and omissions and untimely design submissions, was provided to this office. The letter states that it is based on the representative's supervision of Jenkins and is independent of the evaluation committee's determination. Another letter in the file, written by the president of the construction company involved in the earlier phases of the Hawaiian Gardens project, indicates that Jenkins' drawings were not adequate to perform the scope of work for the project and addresses specific design deficiencies. The contracting officer disputes Jenkins' factual allegations, and asks that the protest be denied.

In comments to the contracting officer's report, as well as in supplemental comments, Jenkins states that it had been encouraged to participate in the pre-screening process by Postal Service personnel because of its satisfactory performance on previous phases of the project, that it actually has performed beyond ordinary expectations, and that the subsequent poor evaluations are inconsistent with the aforementioned Postal Service encouragement to participate.^{1/} Jenkins disputes the credibility of the letter from the Postal Service's project manager who indicates that Jenkins' performance on postal work has been unsatisfactory. Jenkins states that the letter is factually incorrect and questions the letter's validity since it was written subsequent to the submission of Jenkins' protest. Jenkins further alleges that the letter was written solely for the purpose of justifying the Postal Service's improper actions.^{1/} Jenkins alleges that construction contractors involved in the prior phases of the project have stated that its

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documents were satisfactory and that similar representations have been made by postal officials, but has supplied no supporting evidence in this regard.

Jenkins maintains that other firms, less qualified than itself, were selected for further interviews.^{1/} It suggests that a member of the evaluation committee should have recused himself from the panel because of bias against Jenkins, and that this member improperly influenced the other committee members.

A protest conference was conducted, after which comments were submitted, in which the protester refined its earlier positions. Jenkins asserts that there was no evaluation made contemporaneously with its performance and nothing at all from the project files or from the protest record to justify a negative evaluation. Jenkins further states that the negative evaluation and this protest have affected its business; for instance, Jenkins has received no additional work on its two year term contract since the protest was filed and that all such work has been given to other term architect/engineer firms. Additionally, Jenkins believes that it will effectively be ineligible for consideration of future contracts because of the* present dispute. Jenkins has supplied a letter from a Hawaiian Gardens building official who reviewed its plans, conducted inspections, and performed administrative functions relating to the first two phases of the project. This letter indicates that Jenkins' plans were sufficient, that the project was promptly completed and that Jenkins' performance was satisfactory.

The protester also has presented information that the Postal Service's volume of the firm's work, as measured by Postal Service billings as a percentage of total firm billings, represented only 3% of the firm's total workload, in an attempt to rebut the claim that a heavy Postal Service workload should have been a contributing factor to its failure to have been selected for an interview.

The standard of review^{1/} of the evaluation of offers submitted in response to a

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solicitation is:

The determination of the desirability of proposals is largely subjective, primarily the responsibility of the procuring [activity], and not subject to objection ... unless shown to be unreasonable, arbitrary or violative of the law.

Cohlmlia Airline. Inc., supra, quoting High Plains Consultants, Comp. Gen. Dec. B-215383, October 18, 1984, 84-2 CPD | 418; See J.W. Bateson Company. Inc., P.S. Protest Nos. 88-44, 88-52, November 1, 1988. The protester bears the burden of showing that the evaluation was unreasonable. Cohlmlia, supra.

In attempting to meet this burden, Jenkins offers its statements that its prior performance has been satisfactory; that it was encouraged by postal officials to participate in the process; that other, less qualified firms, had been selected for further interviews by the evaluation committee; that the post-protest justifications offered by the Postal Service should be discounted since no evaluations contemporaneous with performance were provided; that construction contractors and postal officials have opined that its documents were sufficient; evidence that its postal billings represented a comparatively low percentage of total firm billings; and a letter from a building official that its plans were sufficient. The allegations and evidence presented by Jenkins do not carry its burden of proof in view of the evidence proffered by the contracting officer which contradicts many of Jenkins' assertions and the contracting officer's unequivocal denial of Jenkins' factual allegations.^{1/} The letter and attachments from the Division representative detail sufficiently problematic performance to justify the negative representations contained therein^{1/} and conveyed to the evaluation committee, and

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which caused sufficient doubt in the minds of the committee and the contracting officer for them reasonably to have decided to exclude Jenkins from further consideration through the interview round of the solicitation. To the extent the protester challenges the substance of these performance deficiencies, we must resolve this purely factual conflict in favor of the contracting officer's position. The protester has not overcome the presumption that the contracting officer's factual assertions are correct. Harpers Ferry Properties, Inc., P.S. Protest No. 76-67, November 8, 1976; Alta Construction Co., P.S. Protest No. 85-2, February 26, 1985. The letter from the president of the construction company on the earlier phases of the project corroborates the negative evaluation.

Based upon the foregoing, the protester has failed to overcome the presumption of correctness accorded to contracting officers' statements, which are therefore accepted as correct. Edsal Machine Products, Inc., P.S. Protest No. 85-84, January 29, 1986. While the credibility of the post-protest letters and evaluations is properly subject to challenge, the fact remains that Jenkins has not offered persuasive proof of improper Postal Service action. While documents evaluating Jenkins' performance created for purposes of the protest may not deserve the same weight as those prepared at or immediately following performance, they are still the project manager's assessment of Jenkins' qualifications as conveyed to the selection committee and may be considered in this proceeding.

The evaluation, as conducted, and its conclusions were reasonably within the scope of the contracting officer's discretion. Cohlma, supra. Jenkins' work on prior phases of this project does not entitle it to be selected for further interviews unless its prequalification submission so warrants. Incumbency carries no such inherent advantage. Cf. Frequency Engineering Laboratories Corporation, Comp. Gen. Dec. B-225606, April 9, 1987, 87-1 CPD | 392; Cohlma, supra.

To the extent that Jenkins' protest raises questions of bad faith, it has not met its burden. Allegations of bad faith must be proven by virtually irrefutable proof of malicious and specific intent to harm the protester, not merely by inference or supposition. In the absence of such evidence, contracting officers are presumed to act in good faith. Graphic Technology, Inc., P.S. Protest No. 85-66, December 30, 1985.

The protest is denied.

[Norman D.Menegat for]

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[Compared to original 5/27/94 WJJ]